IN THE

Supreme Court of the United States

No. 635

McCRADY CONSTRUCTION COMPANY, a corporation,
Petitioner,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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No. ..... TERM 1946.

McCRADY CONSTRUCTION COMPANY, a corporation,
Petitioner,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your Petitioner, McCrady Construction Company, a corporation, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals entered in the above case on July 23, 1946, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

Opinions Below.

The Opinion of the District Court, granting the plaintiff's prayer for injunction (R. 113) is reported in 60 Fed. Supp. 243.

The Opinion of the Circuit Court of Appeals (R. 201) is reported in Fed. . NOT YET REPORTED

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 23, 1946. The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended.

Questions Presented.

The petitioner, a small contractor, performed contracts for municipalities and manufacturers in the metropolitan district of Pittsburgh, Allegheny County, Pennsylvania, covering highways and bridges, railroads, telephone conduits and industrial installations. The question is presented under Sections 3 (b) and 3 (j) of the Fair Labor Standards Act of 1938, as amended, as follows:

Whether the employees of a local construction company employed in the following activities are engaged in commerce or the production of goods for commerce within the meaning of the Fair Labor Standards Act:

(a) Doing work on State, county and municipal roads, streets, bridges, curbs, sidewalks and sewers in an industrial area.

(b) Constructing foundations for new facilities and constructing roadways, sewers, sidewalks and other improvements in existing industrial plants.

(c) Constructing foundations for facilities for railroad serving industrial factories producing and shipping steel to other states.

(d) Constructing new railroad facilities to be used by industrial and armament plants then non-existent.

(e) Placing underground tile conduit for telephone companies.

Statutes Involved.

The Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Section 201.

Section 3 (b) "'Commerce' means trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof".

Section 3 (j) "'Produced' means produced, manufactured, mined, handled or in any other manner worked on in any state; and for the purposes of this Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods or in any process or occupation necessary to the production thereof in any state".

Section 7 (a) "No employee shall, except as otherwise provided in this Section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) For a workweek longer than forty-four hours during the first year from the effective date of this section.

(2) For a workweek longer than forty-two hours during the second year from such date, or

(3) For a workweek longer than forty hours after the expiration of the second year from such date

unless such employees received compensation for his employment in excess of the hours specified at which he is employed".

Statement.

This action was brought by the Administrator of the Wage and Hour Division of the United States Department

of Labor in the western district of Pennsylvania against your petitioner seeking to restrain it from violating section 15 (a) (2) of that Act. The complaint sets forth that the defendant's employees were engaged in maintaining, repairing and reconstructing instrumentalities of interstate commerce and factories, buildings, machinery and equipment used to produce goods for commerce and had failed to compensate them in accordance with section 7 (R. /). The answer of the defendant denied substantially all of the allegations of the complaint (R. /). By pre trial stipulation, the parties agreed to confine the testimony to some fifty-eight separate contracts relating to work of six different types as follows (R. 1113):

1. Public highways, roads and bridges.
2. Motor carrier terminal facilities.
3. Telephone facilities.
4. Railroad facilities.
5. Industrial plant facilities.
6. Loading iron ore and limestone.

It was further stipulated that defendant's employees employed on these projects were not compensated in accordance with section 7 (a) of the Act. After a lengthy trial, the district court granted the prayer of the Administrator and adopted for his findings of fact and conclusions of law, without change, those proposed by the Administrator (R 172). The Circuit Court of Appeals affirmed *in toto* the decision of the district court (R. 209).

Facts.

Your petitioner has admitted coverage on the motor carrier terminal facilities, loading iron ore and limestone and certain of the railroad and industrial projects. The petitioner contends that no coverage exists as to some thir-

ty-nine projects remaining. Under the circumstances, this case must be considered as thirty-nine cases in one suit and the Statements of Facts below is necessarily long.

I. Highways and Bridges.

Ten of the factual situations concern highways and bridges, four were constructed for the Commonwealth of Pennsylvania. These contracts pertained to city streets in a commercial district and borough streets in a residential district which were traversed by U. S. Routes 22 and 30. The work done was the removal of the existing surface, excavation and removal of old base and the construction of a new reinforced concrete surface (R. 4-7). Simultaneously the company constructed under contract with the local municipalities curbing, drainage and sidewalk for the accommodation of pedestrians.

The remaining six jobs were for the County of Allegheny and included a county road and a street in downtown Pittsburgh not a part of any State or U. S. Route, new approaches and abutments for a new bridge between two boroughs and two streets in boroughs, suburbs of Pittsburgh, not a part of U. S. or State Routes.

The work consisted of removing the old pavement, widening and straightening the road and street portion, excavating and the construction of a new concrete surface with curbing, sidewalks and drainage (R. 7-8).

The bridge work done by the defendant was new concrete piers and abutments and the paving of new approaches for a new vehicle and pedestrian bridge between the Boroughs of North Braddock and East Pittsburgh.

II. Industrial Installations.

The defendant did work for the Carnegie Illinois Steel Corporation, the Westinghouse Electric Corporation and the Scaife Company, all of whom produce goods for interstate commerce (R. 174).

The jobs for Carnegie Illinois were:

1. Constructing foundations, drainage and substructure for a building which was later to house a new electrolytic tinning mill (R. 39).
2. Constructing foundations for a new Weigh and Traffic Office Building (R. 33).
3. Constructing new bituminous and concrete road at the Irvin Works of the Carnegie Illinois Company (R. 33).
4. Constructing a new concrete road to the Mill Office of the Irvin Works (R. 42).
5. Spreading limestone on parking lots (R. 34).
6. Spreading slag on a parking area and constructing new concrete sidewalks to the plant restaurant (R. 35).
7. Constructing new foundations for plate shearing lines at the Irvin Works (R. 40).
8. Digging new trenches and lining them with concrete for subsequent later use by the Steel Corporation as acid disposal facilities (R. 37).
9. Digging new drainage ditches to drain surface water from a hill which overlooks the plant site of the Irvin Works (R. 40).
10. Cleaning off loose earth on the hill referred to in preceding paragraph (R. 41).
11. Removing by power shovel and tractor cinders from a public roadway which had slid from property of the Steel Company (R. 38).

12. Filling in a hole where an old foundation was abandoned by the Steel Company, and the placing of a concrete floor on the new surface thus created. (R. 36).
13. Constructing foundations for a new coil stop (R. 37).
14. Constructing foundations and concrete sub floor for extension of Tin Inspection Department Warehouse and Lumber Department (R. 39).
15. Encasing a stream on the land of Carnegie Illinois Company with a 72" concrete pipe so that the land could be used as a cinder dump (R. 62).

The jobs for the Scaife Company were:

(1) Constructing a new sewer from the plant to an outlet in the Allegheny River (R. 55).
(2) Constructing a new concrete crib wall along the bank of the Allegheny River at the plant site (R. 58).
(3) Constructing a new railroad siding to a new plant intended for the manufacture of munitions for the United States of America (R. 51).

The jobs for the Westinghouse Electric Company were:

(1) The grading of a new roadway which was to be used by the Westinghouse for transport of its goods in process of manufacture (R. 54).
(2) The constructing of a new concrete roadway from the entrance gate to its plant at Trafford, Pa. (R. 53).

III. Railroad Facilities.

The Union Railroad Company is a Class One Switching Railroad operating within a radius of ten miles in Allegheny County, Pa.

The work done by the McCrady Construction Company was:

(1) The Linde Air Products Company asked the Union Railroad to build for it an underpass to provide access to a new plant which the Linde Company was about to erect. The defendant did the work for the Railroad Company. The plant was not completed nor were any goods produced until long after the underpass was completed by the defendant (R. 50).

(2) Grading the land of the Linde Company to provide a new road-bed for a siding later to be constructed by the Linde Company (R. 45).

(3) Removing a multiple arch concrete structure abandoned by the Railroad Company and constructing of foundation for a new bridge (R. 46).

(4) Repairing the roof of the Round-House in which the locomotives of the Company were housed for service and repair (R. 47).

(5) Excavating and placing concrete foundations for a new building to house the Signal Department of the Railroad (R. 47).

(6) Grading and constructing foundations for a new Maintenance of Way Shop and Storehouse Building for use by the Maintenance Department of the Railroad (R. 48).

IV. Telephone Facilities.

The jobs for the Bell Telephone Company were:

(1) The lowering of certain existing facilities of the telephone company to conform to the new grade of a borough street (R. 28).

(2) Lowering the underground conduit to conform to the grade of a new highway without changing or altering the facilities in any other manner (R. 68).

(3) Constructing a new conduit including the excavation of a trench, construction of manholes, the laying of pipe and backfilling. The installation of the electrical facilities and telephone lines was done later by the Telephone Company (R. 29).

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

(1) In failing to hold that the work of defendant and its employees constituted original or new construction and therefore constituted essentially local activities and was not within the scope of the Act.

(2) In holding that the defendant's employees engaged in the type of work on public roads, streets, sidewalks, curbs and bridges, as shown by the evidence, were engaged in interstate commerce.

(3) In holding that the defendant's employees working on public highways, streets and bridges in Allegheny County, Pennsylvania, were engaged in occupations necessary to the production of goods for commerce.

(4) In holding that defendant's employees working on foundations for new industrial facilities, which were expansions of existing plants, were engaged in occupations necessary to the production of goods for commerce.

(5) In holding that the defendant's employees engaged in the construction of plant roadways, parking lots, sidewalks and drainage were engaged in occupations necessary to the production of goods for commerce.

(6) In failing to hold that the defendant's employees working on railroad contracts of the type described in the

evidence were engaged in new or original construction and therefore were not within the scope of the Act.

(7) In holding that the defendant's employees engaged in the relocation of existing telephone facilities in connection with roadway improvements were engaged in interstate commerce.

(8) In failing to hold that the work of defendant's employees on new telephone conduits constituted new or original construction and therefore was not within the coverage of the Act.

(9) In failing generally to differentiate between the activities of employees engaged in different types of work on the same project such as offsite excavation, sidewalk and sub-surface drainage, and etc.

(10) In affirming the judgment of the District Court.

Reasons for Granting the Writ.

The Circuit Court of Appeals in affirming the holding of the District Court has broadened the scope of the Fair Labor Standards Act beyond the intent of the Congress. The Administrator brought this suit for the purpose of obtaining a judicial construction of the matter of coverage of practically the entire heavy and highway construction industry. Each of the fifty-eight jobs or projects selected by the counsel for both parties at the pre trial conference, was so selected because it presented a particular problem of coverage, the solution of which was doubtful under the existing decisions of this Court, and other federal courts. Both the District Court and the Circuit Court of Appeals lumped the questions involved, overlooked many phases of the activities, did not give to each factual situation the consideration and attention which it deserved. Petitioner con-

tends that the thirty-nine factual situations which are the subject of this appeal are each one in itself a separate case calling for a separate discussion. For the guidance of employers and employees in similar situations, the opinions and adjudications thus far have failed adequately to discuss the conflicting views of the various Circuit Court decisions, to differentiate the varying degrees of relationship of the activities to the national picture, or to assist in any manner in the "empiric process of drawing lines from case to case and inevitably nice lines" (10 East 40th Street Building, Inc. v. Callus, Ltd.)

Your honorable Court has emphasized the difference between coverage of employees engaged in commerce under section 3 (d) and the broader coverage of employees engaged in the production of goods under the last phase of section 3 (j). The highway, street and railroad cases involve the question of coverage under the commerce section and the court below has disregarded the holding that Congress did not intend to include the activities of employees which can be said only to affect or indirectly relate to commerce. In the industrial cases the court below disregarded the factor of remoteness of the particular occupations from the physical process and has defeated the express intention of Congress to leave essentially local activities to the regulation of local authorities.

1.

The finding of the Court below that all the highway, roads and streets were used in a substantial extent by commerce is not warranted by the evidence.

Much evidence was produced by both parties as to the use of the roads, streets and bridges involved. It was shown that they were used by mail, express and motor freight com-

panies. The proportion of such use to actual traffic was not shown, but of necessity, it could only be extremely small. The only evidence of actual use of the highways involved consisted of traffic counts produced by petitioner and petitioner submits that these are the only real evidence.

From these it appeared that as to the projects on U. S. numbered routes, the vehicles carrying foreign plates ranged from 3.7% in the case of a street in Pittsburgh, to 19.2% in the case of a highway in the suburbs. Of the total traffic, which was never less than 72% of passenger vehicles, from 1.6% to 8% bore I. C. C. plates (R. 131).

On projects classed as county roads, foreign vehicles were 2% or less of total traffic, and less than 1% carried I. C. C. plates (R. 138).

On streets in residential sections of municipalities, over 85% of the traffic was passenger cars, less than 1% carried foreign plates and practically no commercial vehicles carried I. C. C. plates (R. 138).

The fact that all of the streets were accessible to interstate traffic is not a factor in determining whether the use was in fact substantial. Petitioner submits that the courts must, in applying this statute to these various situations in the construction industry, draw the line somewhere, and set forth the criteria for so drawing.

In this respect the Court below has entirely failed, by reason of neglecting to examine each project separately, and to apply common sense to the facts at hand.

2.

The holding of the court below that the doctrine of new construction does not apply is not warranted under the evidence and is in conflict with the decision of the Circuit Court of Appeals for other circuits.

The doctrine of new construction is that new or original construction does not constitute commerce or an instrumentality of commerce until it has been completed and actually used for and in such commerce. It is supported by sound reason, and has been recognized by many courts in decisions under the Federal Employer's Liability Act: *Shank v. D. L. & W. R. R. Co.*, 239 U. S. 556; *Raymond v. Chicago M. & St. P. Ry. Co.*, 243 U. S. 43; *N. Y. Central Ry. Co. v. White*, 243 U. S. 188.

The Court below in holding that the decisions under the Federal Employer's Liability Acts are of no help in construing questions of coverage under the Fair Labor Standards Act is in direct conflict with the language of this Court in *Overstreet v. North Shore Corp.*, 318 U. S. 125 wherein pp. 131, 132 Justice Murphy clearly indicated that such decisions should be applied in interpretation of the Fair Labor Standards Act.

The Administrator himself recognizes the doctrine in Bulletin No. 6 Dec. 1939 and Release G-162 May 15, 1941, with respect to cases involving buildings, and while such interpretations are not controlling they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance": *Skidmore v. Swift & Co.*, 323 U. S. 134.

The application of this doctrine arises in both the highway and industrial groups of jobs here involved. First is the question of whether the doctrine enters into a discus-

sion under this Act at all; second, if it does, is it applicable to the factual situations involved? The decision of the Court below in refusing to recognize the doctrine is in conflict with *Nieves vs. Standard Dredging Co.*, 152 F. 2d 719 (C. C. A. 1) and *Noonan v. Fruco Construction Co.*, 140 Fed. 2d 633 (C. C. A. 8) wherein the doctrine was followed in both "commerce" and "production of goods" cases.

As to the facts, petitioner submits that in the highway, railroad and telephone cases there are three types of situations where the doctrine is applicable. First, construction where nothing had existed before, such as the Dookers Hollow Bridge (R. 21). Union Railroad Maintenance Shop (R. 45), and the East Liberty, Pittsburgh telephone conduits (R. 31); second, relocation projects, where an existing road or instrumentality was removed or abandoned, and new right of way or location used, *i. e.*—Campbell's Run Road project (R. 23) and Union Railroad Signal Tower (R. 57); third, projects where the existing right of way was used, but by reason of widening, degree of change in grade, material and type of surface, a new road may be said to have been constructed, *i. e.*, West Carson St. project, (R. 3), Ardmore Boulevard project (R. 13), Hawkins Avenue project (R. 23) and Union Railroad Viaduct project (R. 46).

The same type of situation exists with respect to the industrial cases; entirely new construction, relocation and expansion projects in existing plants, and reconstruction of such great magnitude as to give rise to a finding that it is new construction. Petitioner feels that in all these categories there is such a degree of remoteness from commerce or production of goods for commerce, as the case may be, that the doctrine of the construction cases should apply. The Court below was in error in characterizing these projects as repair, maintenance and reconstruction.

3.

The Court below in holding that the petitioner's employees were immediately participating in commerce in the highway, railroad and telephone projects and were an essential part of the process of production in the industrial projects has nullified the clearly expressed intention of Congress and has misconstrued the interpretations of this Court on the question.

By virtue of the decision of this Court in *Warren-Bradshaw Drilling Co., v. Hall,* 317 U. S. 88, *Pederson v. Fitzgerald,* 318 U. S. 740 and anticipating its decision in *Walling v. Roland Electrical Company,* 66 Sup. Ct. 413, the petitioner conceded coverage in some thirteen small projects which were in the category of repairs. In addition to the reasons heretofore assigned, the petitioner contends that remoteness and lack of connection with commerce precludes a finding of coverage on the remaining projects.

This Court many times has emphasized that the scope of the Fair Labor Standards Act is "not coextensive with the limits of the power of the Congress over commerce" (Kirschbaum v. Walling, *supra)* and in the production of goods cases, *Armour & Co. v. Wantock,* 323 U. S. 126, *10 East 40th Street Building, Inc. vs. Callus,* 325 U. S. 578.

The same statement appears with reference to commerce cases: *McLeod v. Threlkeld,* 319 U. S. 491.

In all of the highway cases, the projects included work in the nature of drainage off the cartway and most included curbs and sidewalks; two cases involved off-site excavation for the purpose of providing additional earth in the projects. Petitioner's contention below was that such off-site work of curbing, sidewalk and drainage was purely for local use and for the benefit of pedestrians and abutting

property and therefore had no relation to interstate commerce whatsoever. The evidence clearly sustained this contention but neither the District Court nor the Circuit Court adverted to this phase of the petitioner's argument below. In this it is contended that they committed clear error for these employees did not meet the requirement that they be so closely related to the movement of commerce as to be a part of it. For the same reason, the employees engaged in excavating material in borrow pits located some distance from the job site cannot be held to be within the coverage of the Act: W. & H. Opinion Letter October 18, 1940.

In the industrial cases involving projects constructed for producers of goods for interstate commerce, the petitioner's contention is that no coverage exists because of remoteness. This Court in a series of cases calling for a decision as to when employees are engaged in an occupation necessary to the production of goods for commerce has set forth certain criteria which the courts must follow. There must be "a close and immediate tie with the process of production" (Kirschbaum, *supra).* The employees need not be essential or vital but as a practical matter be a part of an integrated effort for the production of goods: (Armour, *supra).* "However, merely because an occupation is indispensible in the sense of being included in a long chain of causation, which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act" "* * * Remoteness of a particular occupation from the physical process is a relative factor in drawing the line" (Callus, *supra).* The evidence shows many situations of varying degrees of remoteness from the process of production: The construction of parking lots for industrial plants (R.34); the laying of concrete drain pipe to drain water from surrounding territory through a refuse dump of a steel company (R.62); a

drainage ditch to drain a hillside adjacent to a steel plant (R. 40); for an industrial plant, a retaining wall which was an extension of a W. P. A. project (R. 57); a sidewalk to a plant cafeteria (R. 36). In each of these cases, it is difficult to see any connection with the operation of the plant as a whole and the work of petitioner's employees was many steps removed from the actual fabricating of the goods produced. Indeed in two cases, one involving removal of cinders sliding off property of a steel plant to other property (R. 38) and the other the construction of a trench later used to remove acid to convert it to a neutral product (R. 37), the record is barren of any evidence of connection with the production processes, and in the former the plaintiff's witness admitted that it had no relation to the actual plant whatever.

It is obvious that the Court below is in error in characterizing the above projects as of prime importanec to the proper function of the facilities in question.

Petitioner submits that the circuit court failed to consider each project on its own separate state of facts. In so failing it has disregarded the criteria established by this Court to aid the judiciary and litigants in deciding what practical adjustments must be made as between what remains within the scope of local regulation, and what has been embraced by federal authority.

Importance of the Question.

As has been indicated, the decision in the case will be the guide by which employers and employees in the heavy and highway construction industry must order their business lives. It will have far reaching implication in every section of the country because of the large part that the construction industry must play in the transition from war economy

to peace. As it now stands, for the purpose of enforcement of the Act, the Administrator may assert jurisdiction far beyond the dictates of Congress. The preservation of the integrity of the interpretive power of the courts, and the court's duty to restrain the excesses of an administrative agency require that the decision of the Court below be brought here for review.

WHEREFORE it is respectfully submitted that this petition for certiorari should be granted.

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October, 1946.